

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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ORAL ARGUMENT SCHEDULED FOR OCTOBER 14, 2005]

No. 03-5288

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: GALE A. NORTON, SECRETARY
OF THE INTERIOR IN HER OFFICIAL CAPACITY,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici:

The petitioner is Gale A. Norton, Secretary of the Interior, in her official capacity. The defendants-appellants in the underlying litigation are Secretary Norton; the Assistant Secretary of Interior-Indian Affairs; and John W. Snow, as Secretary of Treasury. The named plaintiffs-appellees in this class action are Elouise Pepion Cobell; Earl Old Person; Penny Cleghorn; Thomas Maulson; and James Louis Larose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.


B. Rulings Under Review:

This mandamus petition arises out of the class action litigation in Cobell v. Norton, No. 96-1285 (Lamberth, J.). On May 29, 2003, the government moved in district court for the recusal of then Special Master Alan Balaran. On October 17, 2003, the government filed a mandamus petition in this Court seeking the Special Master's recusal. On March 15, 2004, the district court denied the government's recusal motion. The district court's decision is reported at 310 F. Supp. 2d 102 (D.D.C. 2004) (JA 53). Mr. Balaran resigned as Special Master on April 5, 2004.

C. Related Cases:

In In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004), issued after Mr. Balaran's resignation, this Court barred the release of reports that had been prepared by Mr. Balaran in connection with pending individual contempt proceedings, holding on mandamus petitions filed by eleven current and former government employees that Mr. Balaran should have been disqualified from those proceedings in light of his ex parte contacts in the litigation.

This Court has issued four other decisions in appeals arising out of this litigation. See Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). Two additional appeals are currently pending. See Cobell v. Norton, No. 05-5068 (scheduled for oral argument on September 16, 2005); Cobell v. Norton, No. 05-5269 (notice of appeal filed on July 25, 2005).



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GLOSSARY

APA	Administrative Procedure Act
IIM Accounts	Individual Indian Money Accounts
Interim Report	Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report (April 21, 2003) (JA 93)
NAID	Native American Industrial Distributors, Inc.
TAAMS	Trust Asset and Accounting Management System

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ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED
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BRIEF FOR THE PETITIONER

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. 1331 and 1361, inter alia. This petition invokes this Court's mandamus jurisdiction under 28 U.S.C. 1651.

STATEMENT OF THE ISSUES

In this ongoing class action involving individual Indian money ("IIM") trust funds, this proceeding concerns the conduct of former Special Master Alan Balaran. While serving as Special Master, Mr. Balaran, without notice to the government, hired an officer of a firm that had alleged government wrongdoing to assist him in investigating and reporting on the firm's allegations. After the government filed this mandamus petition seeking his disqualification as Special Master, Mr. Balaran resigned, charging that the disqualification motion was a sham to prevent him from issuing reports of his investigations. The questions presented are:

1. Whether Mr. Balaran's conduct as Special Master required his disqualification from this case under 28 U.S.C. 455(a) and 455(b)(1); and

2. Whether, in light of the facts establishing actual bias, this Court should bar prospective reliance on the Special Master's work product and direct that his reports be vacated.

STATUTES AND REGULATIONS

The text of the judicial disqualification statute, 28 U.S.C. 455, is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This class action involving individual Indian funds held in trust by the United States has been before this Court on numerous occasions. See Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). Two appeals are currently pending, as we discuss below. See Cobell v. Norton, No. 05-5068; Cobell v. Norton, No. 05-5269.

At issue on this mandamus petition is the conduct of former Special Master Alan Balaran. The district court first appointed Mr. Balaran in 1999 to oversee specified discovery matters. Over time, the district court assigned Mr. Balaran additional duties.

In 2002, a government contractor, Native American Industrial Distributors, Inc. ("NAID") sought to intervene in this litigation to pursue a contract dispute with the government in connection with its work on the Trust Asset and Accounting

Management System ("TAAMS"), a computer system for tracking the status of property held in trust for IIM account holders.

JA 175, 184. NAID claimed that the Department of the Interior had shifted work to another contractor in retaliation for NAID's unfavorable assessment of the progress of TAAMS, and that Interior had intentionally disregarded NAID's assessment of TAAMS in a quarterly report to the district court. JA 184-96. At the time, the purported inaccuracy of the government's quarterly reports regarding the status of TAAMS was at issue in pending contempt proceedings that had been the subject of a lengthy trial. See Cobell, 334 F.3d at 1135, 1148-49.

The district court denied NAID's intervention request, JA 197, but directed Special Master Balaran to investigate NAID's charge that Interior had withheld material information that should have been disclosed in the quarterly report. JA 212-13. In April 2003, Mr. Balaran issued an "Interim Report" endorsing NAID's contentions, concluding that Interior had withheld material information from the quarterly report to conceal infirmities in the TAAMS system. JA 93.

A footnote at the outset of the Interim Report stated that the Special Master's findings were based on documentation "obtained outside of the normal channels and to which the parties may have no familiarity." JA 93 n.1. The government subsequently learned that Mr. Balaran had, without notice to the government, hired a NAID Vice President and complaining witness,

Mike Smith, to assist in the investigation of NAID's allegations of government misconduct. JA 6-7, 20-27, 221-47.

When the government learned of the Special Master's conduct, it filed a motion in district court to disqualify Mr. Balaran as Special Master under 28 U.S.C. 455(a) and 455(b)(1). Although the government repeatedly sought expedited consideration of the motion, the district court did not issue a ruling and, in October 2003, the government filed this mandamus petition in this Court.

The Special Master eventually responded to the government's disqualification motion, admitting the essential facts on which the motion was based, but asserting that disqualification was not required. JA 1. On March 15, 2004, the district court denied the disqualification motion, concluding that the Special Master had "engaged in no untoward conduct and demonstrated no bias or partiality." JA 53.

This Court originally set the government's mandamus petition for oral argument on April 8, 2004. On April 5, 2004, Mr. Balaran submitted his resignation as Special Master, which the district court accepted on April 6. JA 87. The Special Master's resignation letter charged that the recusal motion was frivolous and was actually a sham to prevent the Special Master from issuing reports of his investigations. JA 88-90. Plaintiffs have continued to cite Mr. Balaran's reports, including the Interim Report on the NAID investigation, in the underlying litigation. See pp. 38-39, infra.

In September 2004, after Mr. Balaran's resignation, this Court decided In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004). There, eleven government employees had filed mandamus petitions seeking Mr. Balaran's disqualification from individual contempt proceedings pending against them in this case. This Court held that Mr. Balaran's resignation did not moot the question of his disqualification, explaining that if Mr. Balaran "should have been recused from the contempt proceedings, then any work product produced pursuant to the [contempt] referrals must also be 'recused' - that is, suppressed." Id. at 1044. This Court ultimately concluded that Mr. Balaran's ex parte contacts as Special Master should have disqualified him from playing any role with respect to the petitioners' contempt proceedings, and "[t]herefore any reports, recommendations, or other work product Balaran prepared pursuant to the [contempt] referrals may not be submitted to the district court or otherwise disseminated in any manner." Id. at 1046.

STATEMENT OF FACTS

I. General Background Of This Litigation.

The history of the underlying litigation is set out at length in the government's briefs on the pending appeal from the district court's structural injunction. See No. 05-5068. Briefly, the Department of the Interior holds approximately \$400 million in trust for the benefit of individual Indians. As of December 31, 2000, these funds were maintained in approximately 260,000 separate Individual Indian Money accounts. In 1994,

Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239. Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)."

Plaintiffs brought this class action in 1996. In December 1999, the district court issued a declaratory judgment holding that defendants had an enforceable duty to account for the balances in IIM accounts. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31, 56 (D.D.C. 1999). In February 2001, this Court largely affirmed, holding that agency action had been unreasonably delayed. Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001). This Court noted that the district court had properly remanded the matter to Interior, leaving to the agency the choice of how the accounting would be conducted while requiring the agency to file quarterly reports. Id. at 1104, 1109.

In September 2002, the district court held Secretary Norton and an Assistant Secretary in contempt because they had purportedly failed, among other things, to report accurately on the progress of the "TAAMS" computer system in quarterly reports. Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). Based on its contempt findings, the district court terminated the remand to the agency, see id. at 152, and declared that it would issue

structural injunctions governing the performance of accounting activities and trust management. See id. at 148-49.

In July 2003, this Court vacated the contempt citations, including the citation for the purported failure to report accurately on the progress of TAAMS. Cobell v. Norton, 334 F.3d 1128, 1148-49 (D.C. Cir. 2003). In the same opinion, this Court vacated orders appointing Joseph S. Kieffer III as Court Monitor and Special Master-Monitor, observing that Mr. Kieffer had been "charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at 1142.

In September 2003, notwithstanding this Court's decision vacating the contempt citations, the district court issued a structural injunction encompassing the performance of an accounting and the implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). Congress responded to the injunction with legislation enacted in November 2003, as part of the FY 2004 Interior appropriations statute, Pub. L. No. 108-108. The legislation removed any legal requirement to perform historical accounting activities before the legislation's expiration on December 31, 2004. On December 10, 2004, this Court vacated all aspects of the structural injunction, except for a single filing requirement in the non-

accounting portion of the injunction. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004).¹

In February 2005, the district court, acting sua sponte, reissued the accounting portion of the structural injunction without modification. The government's appeal from the reissued structural injunction is now pending. See No. 05-5068 (oral argument scheduled for September 16, 2005). This Court granted the government's request for a stay pending appeal and expedited briefing.

On July 12, 2005, the district court issued an order requiring Interior to include in all written communications to class members a notice declaring that all of Interior's trust-related information is of "questionable reliability." JA 480. The opinion purported to announce Interior's "near wholesale abdication of its trust duties," JA 484, and declared Interior a "degenerate" trustee, JA 492. The government's appeal from the July 12 order, and motion for a stay pending appeal, are pending. See No. 05-5269. On July 28, 2005, this Court granted an administrative stay of the July 12 order.

¹ In an opinion issued on December 3, 2004, this Court also vacated a separate injunction ordering Interior to disconnect computer systems from the Internet, explaining among other things that the district court had failed to hold an evidentiary hearing. See Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004). On July 29, 2005, the district court concluded a 59-day evidentiary hearing on plaintiffs' charge that Interior's electronic data is vulnerable to corruption.

II. The Involvement Of Special Master Balaran.

A. Mr. Balaran's Appointment By The District Court.

In February 1999, the district court appointed Alan Balaran to serve as Special Master to oversee discovery. See Order of February 24, 1999 (JA 148). The district court later authorized Mr. Balaran to oversee the government's "retention and protection from destruction of IIM records through, among other things, on-site visits to any location where IIM Records are maintained." Order of August 12, 1999 (JA 152). Subsequently, the district court assigned Mr. Balaran specified responsibilities with respect to Interior's information technology and the security of individual Indian trust data. Order of December 17, 2001 (JA 167). On September 17, 2002, the district court referred to Special Master Balaran, for reports and recommendations, motions seeking to hold 37 current and former government employees in contempt. See Cobell, 226 F. Supp. 2d at 155.

B. Mr. Balaran's Retention Of A NAID Officer To Assist In His Investigation Of NAID's Allegations Of Government Misconduct.

In August 2002, NAID, a government contractor, moved to intervene in this litigation to pursue a contract dispute with the government. JA 175. NAID is an information technology firm that was retained by Interior to provide assistance with the TAAMS computer system. JA 187. NAID claimed that it had provided unfavorable reports on the progress of the TAAMS project, and that Interior had retaliated against it by shifting some of its work to another contractor, Electronic Data Systems

Corporation. JA 184-96. NAID alleged that Interior had purposefully disregarded its assessment of the progress of the TAAMS project in preparing its Eighth Quarterly Report filed with the district court. JA 184-96.

At the time that NAID sought to intervene, the district court had recently concluded its 29-day contempt trial on, among other things, alleged inadequacies in the government's quarterly reporting with regard to the progress of TAAMS. See Cobell, 334 F.3d at 1135, 1148-49. On September 17, 2002, the district court issued its ruling holding the Secretary and an Assistant Secretary in contempt. Cobell, 226 F. Supp. 2d 1. A few days later, the district court denied NAID's intervention motion on procedural grounds, remitting NAID to its remedies under the Contract Disputes Act. Sept. 24, 2002 Order (JA 197). However, on October 7, 2002, the district court asked Special Master Balaran, in an off-the-record communication, to investigate NAID's charge that Interior had withheld information in its Eighth Quarterly Report. JA 199-202; JA 55. After the government declined to produce documents requested by the Special Master in the absence of an order authorizing the investigation, the district court issued an order of appointment:

The Court wishes to ascertain whether there is any validity to NAID's contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report; and is directing the Special Master to investigate whether Interior engaged in any such concealment.

November 5, 2002 Order, at 1 (JA 212). The order directed the Special Master to prepare a report detailing his findings and conclusions. See id. at 1-2 (JA 212-13).

On April 21, 2003, Special Master Balaran issued an "interim" report regarding his investigation into NAID's allegations. See Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report ("Interim Report") (JA 93). The Interim Report concluded that Interior had "withheld material information" in its Eighth Quarterly Report, and "that it did so to conceal infirmities in the TAAMS system and misleading and inaccurate representations in previous quarterly submissions." JA 94 (footnote omitted). The Interim Report declared that the Eighth Quarterly Report was not "designed to provide the [district court] with a candid assessment of the TAAMS effort," but was "contrived to present a gilded portrait of the TAAMS system and avoid adverse consequences arising from contempt proceedings pending at the time." JA 94.

Although the report was dubbed an "interim" report, the Special Master never released a final report on the NAID investigation. The Interim Report was issued three days before this Court's oral argument on the appeal from the contempt ruling against Secretary Norton and Assistant Secretary McCaleb. Plaintiffs immediately filed the Interim Report with this Court as evidence of the government's "contumacious" conduct in the preparation of its quarterly reports. JA 219-20.

Of special relevance here, the Interim Report advised at the outset that the Special Master's findings were based on documentation "obtained outside of the normal channels and to which the parties may have no familiarity." JA 93 n.1. Although the reference was not immediately apparent, an examination of the Mr. Balaran's billing records revealed that from February 27, 2003 through April 16, 2003, the Special Master had employed an individual with the initials "MSS" to assist in the investigation. JA 221-47.

The government subsequently learned that "MSS" was Mike Smith, who, as of January 2003, had been serving as NAID's Executive Vice President and who was a complaining witness in NAID's dispute with the government. JA 214-15. On January 7, 2003, in his capacity as a senior corporate officer, Mr. Smith had sent a letter to Interior - copied to the Special Master - in connection with NAID's contract claim. JA 214-15. The letter reiterated NAID's demand for monetary relief and declared that NAID had "retained the services of counsel because we are dealing with a government agency that is refusing to negotiate with us in good faith. Rather, we have been the target of retaliation; allegations of which are still under investigation by the Court Appointed Special Master." JA 214.

As Mr. Balaran eventually confirmed, he had retained Mr. Smith to assist in his investigation of NAID's allegations. See JA 6-7, 20-27, 221-47 (billing records showing nearly 110 hours of work by "MSS").

On October 30, 2003, after Special Master Balaran had issued his Interim Report endorsing NAID's allegations, NAID wrote to Interior reaffirming that Mr. Smith was a NAID Vice President with "full authority to settle" NAID's pending contract claim. JA 307.

C. The Government's Motion To Disqualify Mr. Balaran And The District Court's Eventual Ruling Denying The Motion.

1. On May 29, 2003, within weeks of learning of Mr. Balaran's retention of Mr. Smith, the government moved in district court for Mr. Balaran's disqualification as Special Master pursuant to 28 U.S.C. 455(a) and 455(b)(1). Docket #2078. The motion explained that disqualification was required in light of Mr. Balaran's undisclosed retention of a NAID officer and complaining witness to assist in the investigation of NAID's allegations of government misconduct. On June 24, 2003, the government moved for expedited consideration. Docket #2115. On September 26, 2003, the government again moved for expedited consideration, and informed the district court that it would seek review in this Court if no ruling was forthcoming by October 15, 2003. JA 301. On October 17, 2003, the government filed this petition for writ of mandamus with this Court, seeking the Special Master's disqualification.

2. On February 17, 2004, nearly nine months after the government had moved for his disqualification, the Special Master submitted a responsive statement in district court. JA 1. In the response, Mr. Balaran conceded that he had hired Mr. Smith to

assist in the investigation of NAID's charges. JA 24-27. As stated by Mr. Balaran, "Mr. Smith worked about 110 hours for the Special Master in the spring of 2003," JA 25; Mr. Smith "assisted" in the NAID investigation "by analyzing the relevant documents, including material that Interior had filed with the Court," JA 15; "Smith's work was consumed with records analysis," JA 26; and Mr. Smith's time entries "reflect Mr. Smith's memorializing of his efforts to organize and record his analysis of the relevant documents," JA 26.²

Mr. Balaran saw nothing improper in his retention of Mr. Smith to gather and analyze evidence of the allegations made by NAID. Mr. Balaran maintained that "[a]s a master performing a court-ordered investigation," he "was entitled to talk to, and retain as staff, any necessary individuals." JA 7. Thus, Mr. Balaran believed that he "had every right to consult with Mr. Smith ex parte and to retain his services." JA 6. Mr. Balaran stated that his "need for Mr. Smith's assistance" was "heightened" by Interior's asserted delay in responding to his document requests, but declared that he "was authorized to retain Smith in any event." JA 6.

² In a supplemental statement, the Special Master did not dispute that Mr. Smith had returned to NAID after working for the Special Master, but asserted that Mr. Smith was not a NAID employee while he worked for the Special Master. See JA 47. Although nothing turns on the point, we note that no record evidence supports this assertion. As of the date of the filing of this brief, NAID's website indicates that Mr. Smith has served as a Vice President since 2002, and identifies no break in service. See <http://www.naid.com/msmith.htm> (last visited Aug. 10, 2005).

Although Mr. Balaran did not suggest that he had informed the government of Mr. Smith's retention or given the government an opportunity to object, he also maintained that Interior had waived any objection to the retention. JA 33. In a supplemental statement, Mr. Balaran argued that the references to "MSS" in his April 1, 2003 billing record should have put the government on notice that he had hired Mr. Smith a month earlier. JA 43-44.

3. On March 15, 2004, the district court issued its decision denying the government's motion to disqualify Mr. Balaran. Although the district court did not question the facts underlying the motion, the district court concluded that Mr. Balaran had "engaged in no untoward conduct and demonstrated no bias or partiality." JA 53. The district court accepted all arguments advanced by Mr. Balaran, echoing its defense of the conduct of former Special Master-Monitor Kieffer, whose appointment had previously been vacated by this Court. See Cobell v. Norton, 310 F. Supp. 2d 102 (D.D.C. 2004); Cobell, 334 F.3d at 1142-45.

The district court reasoned that, as Special Master, Mr. Balaran "was authorized, as a matter of law, to retain experts," JA 70, and concluded that Mr. Balaran "was not only authorized to retain Mr. Smith as an expert, but compelled to do so" in light of what the court regarded as Interior's delay in responding to Mr. Balaran's document requests. JA 73.

The district court did not perceive the evidence as "remotely suggesting that Mr. Smith's interests were antagonistic

to those of the agency" or that he "maintained a financial interest in the Master's investigation." JA 74. The district court saw no relationship between the Special Master's investigation into NAID's charges and NAID's pending contract claim. See JA 75-76.

Apart from these "factual infirmities," JA 78, the district court concluded that the disqualification motion failed as a matter of law under the "extrajudicial source" doctrine. JA 78-80. The district court reasoned that Mr. Smith had been retained as part of an investigation authorized by the district court, JA 78-79, and concluded that Mr. Balaran's findings were "amply supported by a voluminous and painstakingly crafted record," JA 80.

Like Mr. Balaran, the district court concluded that the government had waived the right to object to Mr. Smith's retention because the "MSS" notations in the Special Master's April 1, 2003 billing records should have put the government on notice that the Special Master had hired Mr. Smith a month earlier. JA 80-83. In summary, the district court concluded that "it was well within the ambit of the Special Master's authority to communicate with Mr. Smith on an ex parte basis and to retain his services to assist with the Eighth Quarterly Report Investigation." JA 78. The district court declared that the government's "charges of impropriety" were "misdirected" and "more properly should have been leveled at" Interior's own conduct. JA 78.

D. Mr. Balaran's Resignation As Special Master.

On April 5, 2004, three days before this Court was originally scheduled to hear oral argument on this mandamus petition, Mr. Balaran submitted his resignation as Special Master. JA 87-90. In his resignation letter, Mr. Balaran declared that the district court had been correct in finding the government's recusal motion "frivolous" and in "suggesting that it was Interior that acted improperly by impeding my investigation and that Interior had an ulterior motive for seeking my removal." JA 88. The resignation letter charged not only malfeasance but corruption. It asserted that Mr. Balaran was on the verge of uncovering evidence that Interior was systematically "putting the interests of private energy companies ahead of the interests of individual Indian beneficiaries," JA 89, and that Interior, "supported by the Department of Justice," JA 90, filed a "frivolous" recusal motion with the "ulterior motive" of stifling his investigations, JA 88. His revelations would have been intolerable to the government, Mr. Balaran maintained, because they "could cost the very companies with which senior Interior officials maintain close ties, millions of dollars." JA 89. His investigation, Mr. Balaran asserted, "might well result in energy companies being forced to repay significant sums to individual Indians. Interior could not let this happen." JA 90.

The district court accepted Mr. Balaran's resignation on April 6, 2004, and ordered that the resignation letter be made

part of the record. JA 87. In a separate order, the district court directed the government to pay Mr. Balaran's fees, including over \$65,000 in fees to Douglas B. Huron, who represented Mr. Balaran in opposing the government's recusal motion and petition for mandamus. JA 91.³

E. This Court's Subsequent Decision In In re Brooks, Barring Use Of Mr. Balaran's Work Product In The Individual Contempt Proceedings.

As explained above, the district court in 2002 had referred plaintiffs' motions seeking to hold in contempt 37 current and former government employees to Special Master Balaran. In September 2004, in a ruling issued after Mr. Balaran's resignation, this Court barred the release of any reports, recommendations, or other work product prepared by Mr. Balaran pursuant to that referral, holding that Mr. Balaran's ex parte contacts in the litigation disqualified him from playing any role with respect to the individuals' contempt proceedings. In re Brooks, 383 F.3d 1036, 1044-46 (D.C. Cir. 2004).

Ruling on mandamus petitions filed by eleven of the individuals concerned, this Court explained that "Balaran's four-year involvement in the trust reform litigation entailed innumerable contacts with witnesses and third parties likely to have information relevant to the contempt proceedings." Id. at

³ The district court also ordered payment of fees to Mr. Balaran through April 30, 2004. Cumulatively, Mr. Balaran has received over \$1,775,000 in fees, exclusive of expenses and payment for assistants and experts. The total bill for his services has exceeded \$3,800,000.

1045. "Because Special Master Balaran had ex parte contacts that may have given him personal knowledge of disputed evidentiary facts relevant to the contempt proceedings, those proceedings should never have been referred to him." Id. at 1046. It followed, this Court concluded, that "any reports, recommendations, or other work product Balaran prepared pursuant to the [contempt] referrals may not be submitted to the district court or otherwise disseminated in any manner." Ibid.⁴

SUMMARY OF ARGUMENT

The facts on which this mandamus petition is based are simple and undisputed. NAID, a government contractor working on the TAAMS computer system, sought to intervene in this litigation, alleging government misconduct and seeking to protect its government contracts. Although the district court denied the intervention motion on procedural grounds, remitting NAID to other remedies, it ordered Special Master Balaran to determine whether NAID's allegations might demonstrate a contemptuous failure by the government to provide a complete quarterly report to the court. Without notice to the government, the Special Master then hired NAID's vice president and complaining witness, Mike Smith, to gather and analyze evidence of the misconduct that NAID had alleged. The Special Master then released an "interim" report endorsing NAID's charges, which plaintiffs immediately

⁴ In the same ruling, this Court also denied the individuals' request to disqualify the district court judge from the contempt proceedings. See 383 F.3d at 1041-44.

forwarded to this Court as evidence of the government's "contumacious" conduct.

While Mr. Balaran's response to the disqualification motion did not dispute these facts, it exhibited no appreciation of their significance. Mr. Balaran and the district court believe that judicial officers may assess allegations of fraud by hiring the accusing party to gather and analyze the evidence of his own assertions. Indeed, they intimate that such conduct is routine.

It is not. Judicial officers do not hire complaining witnesses to analyze the merits of their own charges and then release their findings with the laconic notation that the findings are based on material "obtained outside of normal channels and to which the parties may have no familiarity." JA 93 n.1. The attempts of Mr. Balaran and the district court to excuse this conduct only underscore the extent to which the most basic tenets of fairness and impartiality have been left in the dust.

Mr. Balaran does not claim to have given the government any advance notice of his decision to hire Mr. Smith or any opportunity to object. Nonetheless, Mr. Balaran insisted and the district court found that the government "waived" its right to object to Mr. Smith's retention because references to "MSS" in the Special Master's billing records should have put the government on notice that Mr. Smith had been hired more than a month earlier. But the disqualification statute requires full disclosure, on the record, of a basis for disqualification. 28

U.S.C. 455(e). Cryptic clues in billing records of actions already taken plainly do not suffice.

In the face of overwhelming evidence of conduct requiring his disqualification, the Special Master resigned, three days before this Court was originally set to hear oral argument on this petition. While Mr. Balaran's resignation mooted the question of his further participation in the case, it did not obviate the impact of his reports in this ongoing litigation. Two years after Mr. Balaran's resignation, plaintiffs continue to cite these reports, including the Interim Report on the NAID investigation, as evidence of government misconduct.

This petition establishes not only the appearance of bias but actual bias, a point underscored by the resignation letter's unrepentant attitude and cavalier assertion of new, wholly unsubstantiated charges. In In re Brooks, 383 F.3d 1036, 1044 (D.C. Cir. 2004), this Court held that the facts requiring Special Master Balaran's recusal from pending individual contempt proceedings also required that his work product in those contempt proceedings be suppressed, notwithstanding his intervening resignation. That reasoning applies here with equal force. At a minimum, therefore, applying In re Brooks, this Court should vacate the Special Master's Interim Report and any other reports issued after his hiring of Mr. Smith. This Court should also ban any prospective reliance on those reports. The Interim Report was the product of Mr. Balaran's collaboration with Mr. Smith and is clearly tainted for that reason. The collaboration with Mr.

Smith provided the basis for disqualification and the Special Master's subsequent reports thus never should have been issued.

STANDARD OF REVIEW

"A writ of mandamus is 'an extraordinary remedy, to be reserved for extraordinary situations.'" In re Brooks, 383 F.3d at 1041 (quoting Cobell, 334 F.3d at 1137). "Nonetheless," this Court "'will issue a writ of mandamus compelling recusal of a judicial officer where the party seeking the writ demonstrates a clear and indisputable right to relief.'" Id. at 1041 (quoting Cobell, 334 F.3d at 1139).

ARGUMENT

I. Mr. Balaran's Conduct As Special Master Required His Disqualification Under 28 U.S.C. 455(a) And 455(b) (1) .

A. The Ethical Restrictions Of 28 U.S.C. 455 Apply To Special Masters.

Every litigant has a basic right to "a neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972). Disqualification is required whenever a judge's impartiality "might reasonably be questioned." 28 U.S.C. 455(a). This provision requires neither a showing of subjective bias nor a showing that actual bias exists. "The standard for disqualification under § 455(a) is an objective one[;] [t]he question is whether a reasonable and informed observer would question the judge's impartiality." United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001); see also Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988) (judge need not even be aware of the

facts creating an appearance of impropriety "so long as the public might reasonably believe that he or she knew" of such facts).

Section 455(b) requires recusal whenever a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" 28 U.S.C. 455(b)(1). This provision requires recusal where the official has "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ... or because it is excessive in degree." Liteky v. United States, 510 U.S. 540, 550 (1994).

As this Court has twice confirmed in this litigation, "'the ethical restrictions of § 455 apply to a special master.'" In re Brooks, 383 F.3d 1036, 1044 (D.C. Cir. 2004) (quoting Cobell, 334 F.3d at 1128). The same principle was codified in the 2003 amendments to Rule 53 of the Federal Rules of Civil Procedure. "A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification." Fed. R. Civ. P. 53(a)(2) (Dec. 2003).

**B. The Facts Upon Which The Government Based
Its Recusal Motion Are Uncontested And
Compelled Disqualification.**

The facts underlying the recusal motion are simple and uncontested. Indeed, Mr. Balaran confirmed the essential facts in the statements that he filed in response to the motion.

NAID sought to intervene in this litigation to pursue a contract dispute. JA 175. NAID alleged that it had provided unfavorable reports on the progress of TAAMS and that Interior had retaliated against it by shifting some of its work to another contractor. JA 184-95. To support the claim of retaliation, NAID charged that Interior's Eighth Quarterly Report had intentionally disregarded NAID's assessment of TAAMS. JA 189-91.

At that point, the district court had recently concluded the contempt trial on, among other things, the government's alleged failure to disclose all problems related to TAAMS in quarterly reports. On September 17, 2002, the district court issued its ruling holding the Secretary and an Assistant Secretary in contempt. Cobell, 226 F. Supp. 2d 1. A week later it denied NAID's intervention motion on procedural grounds, remitting NAID to its remedies under the Contract Disputes Act. JA 197-98. But the district court directed Special Master Balaran to investigate NAID's allegations and to prepare a report detailing his findings and conclusions. JA 212-13.

From February 27 through April 16, 2003, Special Master Balaran employed Mike Smith, who was serving as NAID's Executive Vice President as of January 2003 and who returned to NAID after

his period of employment with the Special Master. JA 214-15; JA 307.⁵ Mr. Balaran did not inform the government that he was paying a NAID employee to help evaluate NAID's accusations. Mr. Balaran has not suggested that he failed to appreciate who Mr. Smith was or the nature of NAID's interest in the matter. Instead, Mr. Balaran proclaimed that he "was entitled to talk to, and retain as staff, any necessary individuals." JA 7. Thus, he readily acknowledged that Mr. Smith gathered and analyzed evidence regarding his own firm's allegations. See, e.g., JA 15 (Mr. Smith "assisted" in the Special Master's investigation "by analyzing the relevant documents, including material that Interior had filed with the Court"); JA 26 ("Smith's work was consumed with records analysis"); ibid. (time entries "reflect Mr. Smith's memorializing of his efforts to organize and record his analysis of the relevant documents").

On April 21, 2003, three days before this Court was to hear oral argument on the contempt appeal involving Secretary Norton and an Assistant Secretary, Mr. Balaran released an "interim" report concluding that the government had withheld material information in its Eighth Quarterly Report in order to conceal infirmities in the TAAMS system. JA 93. Plaintiffs immediately filed the report with this Court as evidence of the government's "contumacious" conduct. JA 219-20. On October 30, 2003, NAID

⁵ As noted above, Mr. Smith may have remained a NAID Vice President even while he worked for the Special Master. See note 2, supra.

wrote to Interior reconfirming that Mr. Smith was a NAID Vice President with "full authority to settle" NAID's pending contract claim. JA 307.

The case for recusal is incontrovertible. Until this case, it would have been inconceivable that a judicial officer assessing a charge that information had been fraudulently concealed would hire the very person making the charge to gather and analyze the evidence of its accuracy. Any reasonable person would conclude that a judicial officer engaging in such conduct had surrendered all semblance of impartiality. A judicial officer who collaborates with an accusing party to determine the accuracy of the party's accusations cannot under any objective standard be thought impartial. See 28 U.S.C. 455(a), 455(b)(1).

Even the Special Master did not suggest that a judge could have engaged in the type of conduct at issue here. Such conduct would prompt any objective observer to conclude that the judge had determined a priori that one party to the controversy was to be trusted and relied upon in preference to the other. That conclusion is confirmed in this case by Mr. Balaran's decision to issue his report before allowing the government to see and respond to the evidence and analysis provided by its accuser. The impropriety is underscored by the likelihood that any findings in NAID's favor might be advantageous to Mr. Smith and his firm in pressing its contract claim against Interior in other venues. See JA 307 (October 30, 2003 letter reaffirming that Mr.

Smith was a Vice-President of NAID with full authority to settle NAID's pending contract claim).

C. The Government Did Not Consent To Mr. Smith's Retention Or Waive Its Right To Object.

Special Master Balaran did not inform the government that he was hiring Mr. Smith or give the government any opportunity to object to his proposed course of conduct. Nonetheless, both Mr. Balaran (JA 33, JA 43-44) and the district court (JA 80-83) suggested that consent could be inferred and any objection could be deemed waived.

They cannot. By the time of Mr. Smith's retention, the government had made abundantly clear that it would object to the Special Master's hiring of any individuals with interests adverse to the government.

In 2001, Special Master Balaran hired a former Interior employee, Joe Christie, as a technical consultant, notwithstanding the fact that Mr. Christie had testified on plaintiffs' behalf at trial. As the Special Master acknowledged, Mr. Christie was hired over the government's objection. JA 23; see also JA 308-15 (3/29/02 opinion denying motion to rescind the hiring of Joseph Christie).

In late 2002, Mr. Balaran informed the government of his intent to hire an attorney, Anne Fraser, to assist him in evaluating orders to show cause. The government objected on the ground that Ms. Fraser was representing a party in a pending but unrelated administrative action against the government. JA 203-

11. The government urged that Ms. Fraser's retention "would raise serious issues as to whether the Special Master could continue to evaluate the motions for orders to show cause."

JA 206. The government noted further that neither the Special Master nor Ms. Fraser had made the full disclosure, on the record, of the basis for the disqualification, as required by 28 U.S.C. 455 and the Code of Judicial Conduct. JA 207; see also 28 U.S.C. 455(e) (waiver of grounds for disqualification, even where permitted, may be accepted only if "it is preceded by a full disclosure on the record of the basis for disqualification").

Mr. Balaran receded in that dispute and did not hire Ms. Fraser. Four months later, Mr. Balaran chose to hire Mr. Smith, who not only had interests generally adverse to the government (like Ms. Fraser), but whose interests were adverse with specific regard to the task for which he was employed. See JA 214-15 (1/7/03 letter). This time, Mr. Balaran proceeded in secret, without giving the government any opportunity to object.

Given this background, there could be no plausible contention that consent could be inferred. Instead, Mr. Balaran and the district court insisted that the right to object was waived because the Special Master "did not conceal his decision to hire Smith," JA 25 n.18; JA 81-82. What is meant by this statement is that the billing records that Special Master Balaran filed on April 1, 2003, indicated that an individual with the initials "MSS" had been working for the Special Master since February 27, 2003. See JA 43-44. The apparent theory is that

the billing records gave the government "constructive knowledge" of Mr. Smith's retention, JA 82, because Mr. Smith had been present when Mr. Balaran inspected a collection of documents at Interior on February 27. See JA 81; JA 44.

Although the government disputes certain aspects of Mr. Balaran's account of the February 27 meeting with Mr. Smith, the undisputed fact is that government counsel was present as well. JA 24. Mr. Balaran has not suggested that he notified the government that he would be engaging in ex parte contacts with Mr. Smith, much less that he would be putting Mr. Smith on the payroll to assist in investigating and reporting on Mr. Smith's own claims of government wrongdoing.

Plainly, the Special Master could not insulate his conduct from review by providing cryptic clues in his billing records of actions he had already taken. The government had no reason to suspect the Special Master's improper conduct until the Special Master announced in his Interim Report that his findings were based on information "obtained outside of the normal channels and to which the parties may have no familiarity." JA 93 n.1. But in any event, initials noted in billing records hardly constitute the type of "full disclosure on the record" required by the disqualification statute. 28 U.S.C. 455(e).

Mr. Balaran and the district court alternatively suggested that the government's previous consent to specified ex parte contacts by the Special Master waived the right to object to all future ex parte contacts. In that regard, Mr. Balaran and the

district court cited an August 1999 order authorizing Mr. Balaran to make "site visits" in connection with his oversight of Interior's document retention practices. JA 10; JA 68. They also noted a February 2001 order directing Interior to inform employees that they could communicate with the Special Master regarding IIM records-related matters in confidence and without fear of reprisal. JA 11; JA 70.

On their face, these orders had no application outside the specific context to which they were addressed. Clearly, they had no bearing on the 2003 investigation into NAID's allegations.⁶

Just as clearly, nothing in these orders could remotely be construed to allow Mr. Balaran to put hostile witnesses on his payroll to analyze evidence. Indeed, Mr. Balaran's invocation of these orders underscored his fundamental failure to appreciate the extent of his improper conduct. The problem is not merely that the Special Master engaged in significant ex parte contacts without notice or consent, although that alone would be sufficient to require recusal. The Special Master not only obtained ex parte evidence from Mr. Smith; he made him part of the decision-making apparatus. Mr. Smith not only supplied ex parte evidence, he supplied the analysis of that evidence. JA

⁶ Even in the document-retention context, the issue of Special Master Balaran's ex parte contacts became the subject of much dispute and resulted in the government's motion to preclude his use of ex parte contacts. See Interior Defendants' Motion For An Order Directing The Special Master To Conform His Conduct To Limits Stated By The Court of Appeals; To Vacate Or Clarify Existing Orders As Appropriate; And To Act On This Motion on an Expedited Basis (Docket #2295).

15, 25-27. That is why Mr. Smith was not only a witness but a paid assistant. Moreover, the decision to employ Mr. Smith would lead any objective observer to conclude that the Special Master had allied himself with one side of the NAID controversy even before reviewing the evidence. NAID's potential financial interest in the outcome of the Special Master's investigation underscores the extent to which far more than the taking of ex parte evidence was at issue.

D. The Reasoning Of The District Court And Special Master Reflects Premises Rejected By This Court.

There can be no serious contention that Special Master Balaran acted properly in hiring Mr. Smith to gather and analyze evidence of his own accusations. The response of Mr. Balaran and the ruling of the district court on the recusal motion rest on premises that have been flatly rejected by this Court.

Mr. Balaran suggested that his retention of Mr. Smith was not improper because the findings in his Interim Report would be reviewed de novo by the district court. JA 20, 21. But as this Court stressed in In re Brooks, de novo review cannot cure the fact that Mr. Balaran's "compilation of the record for the district court's review, not to mention his reports and his recommendations, would be subject to selection bias[.]" 383 F.3d at 1046. "[A]t the very least, an observer apprised of all the facts would reasonably question his impartiality." Ibid.⁷

⁷ The district court has not, in any event, shown a
(continued...)

For the same reason, it is irrelevant that Mr. Balaran purported to support his findings with attached exhibits, JA 79, and that the government could object to those findings, JA 80. As this Court explained, the "concern is with information that 'leave[s] no trace in the record,' ... that may reasonably be expected to color the way [the Special Master] approaches his task, and ultimately his reports and recommendations to the district court[.]" In re Brooks, 383 F.3d at 1046 (quoting In re Edgar, 93 F.3d 256, 259 (7th Cir. 1996)). The assistance that Mr. Balaran obtained from Mr. Smith was without question "extrajudicial," because it was obtained outside of the adversarial process and left "'no trace in the record.'" Ibid.; see also In re Edgar, 93 F.3d at 259 ("The point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.'").

As the district court's decision made clear, its defense of Mr. Balaran ultimately rested on the same assumptions about the proper scope of a special master's authority that have "guided [the district court] since it first appointed the Special Master

⁷(...continued)
willingness to review Mr. Balaran's reports in a de novo fashion. See, e.g., JA 217 (describing the Interim Report as "the Special Master's report on whatever the latest lie is").

in February 1999.” JA 66. In essence, the district court perceived no ethical restrictions on the exercise of that authority. The district court has repeatedly declared “the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel.” Cobell v. Norton, 237 F. Supp. 2d 71, 75 (D.D.C. 2003) (quoting 3/29/02 Order (JA 314)). In denying the government’s motion to recuse Mr. Balaran, the district court endorsed not only ex parte contacts but the undisclosed retention of an accusing party. Thus, in the district court’s view, the Special Master had what amounted to unlimited “discretion not only to determine the kind of proof he required but also the manner in which he would receive it.” JA 65.

This Court, however, has twice held in this litigation that the ethical restrictions of § 455 apply to a special master. See In re Brooks, 383 F.3d at 1044; Cobell, 334 F.3d at 1128. Although the district court and Special Master invoked the 2003 amendments to Rule 53, those amendments removed any doubt that a master is subject to the restrictions of § 455. See Fed. R. Civ. P. 53(a)(2) (Dec. 2003) (“A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court’s approval to appointment of a particular person after disclosure of any potential grounds for disqualification.”). Amended Rule 53 further required that “the circumstances - if any - in which the master may communicate ex

parte with the court or a party" be set forth in the order appointing the master and defining his duties, which is subject to objection by the parties. Fed. R. Civ. P. 53(b)(2)(B).⁸ Nothing in the amendments or their history suggests in any way that masters may hire witnesses to analyze the evidence in support of their own allegations.

This Court has made equally clear that the district court's 1999 declaratory judgment ruling did not allow the district court to charge its agents "with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Cobell, 334 F.3d at 1142. As this Court explained in vacating the appointment of Court Monitor Kieffer, the Monitor's role could not be likened to the role of a special master appointed pursuant to Rule 53 to supervise the implementation of a court order, see ibid., "for there was no decree to enforce," id. at 1143.

These pronouncements should have had particular force in the context of the NAID investigation, which was, for all practical purposes, a contempt investigation. Having just concluded a contempt trial on (inter alia) the government's allegedly misleading discussion of TAAMS in its quarterly reports, see 334

⁸ The Advisory Committee Notes to the 2003 amendments to Rule 53 further cautioned that "[i]n most settings ... ex parte communications with the parties should be discouraged or prohibited," observing that they may be appropriate in limited contexts such as "seeking to advance settlement," or in "in camera review of documents to resolve privilege questions." Note to subdivision (b).

F.3d at 1148-49, the district court directed the Special Master to ascertain whether Interior had withheld material information about TAAMS from the Eighth Quarterly Report. Plaintiffs filed the Interim Report itself with this Court as evidence of the government's "contumacious" conduct. JA 220. In that context, it is unfathomable that the protections of § 455 would not apply. See also Cobell, 334 F.3d at 1140 (noting that the district court's contempt findings were "functionally criminal rather than civil in nature").

Finally, the suggestion that the Special Master was "compelled" to hire Mr. Smith because of perceived delays in the government's document production, JA 73, is absurd. Even by Mr. Balaran's own account, he hired Mr. Smith after the government had made the requested documents available for inspection. See JA 24. More fundamentally, if Mr. Balaran was dissatisfied with the pace of the government's document production, he could have sought an order from the district court compelling production on a different schedule. He was manifestly not free to hire the complaining witness to obtain information and analysis directly from that source.⁹

⁹ The district court and Mr. Balaran thought it significant that this petition was styled in the name of the Secretary of the Interior rather than in the name of both Interior and Treasury. This petition represents the position of the United States, not just the position of one agency of the United States.

II. Mr. Balaran's Work Product Should Be Vacated In Light Of The Facts Requiring His Disqualification.

In the face of overwhelming evidence of conduct requiring his recusal, Special Master Balaran submitted his resignation on April 5, 2004, three days before this Court was scheduled to hear oral argument on this petition seeking his disqualification. Since that time, plaintiffs have repeatedly moved to dismiss the petition as moot. But while Mr. Balaran's resignation mooted the question of his further participation in the case, it did not obviate the ongoing impact of his voluminous reports, which Mr. Balaran continued to issue even after the government moved to disqualify him for bias.

In the course of this litigation, Mr. Balaran essentially functioned as a prosecutor and grand jury - a role "unknown to our adversarial legal system," 334 F.3d at 1142 - creating evidence and issuing indictments with regard to any matter that, in his view, had some relationship to trust accounting. Echoing the district court, the Special Master proclaimed his right "'to uncover facts and collect evidence via ex parte contacts with parties and counsel.'" Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service, at 1 (Sept. 29, 2003) (JA 294) (quoting 3/29/02 District Court Order (JA 314)).

The Special Master's reports charged the government with malfeasance. In the September 29, 2003 report on his visit to

the Texas Office of the Minerals Revenue Management Division (JA 294), Mr. Balaran purported to find mismanagement with regard to Interior's oversight of oil leases. In an August 20, 2003 report on his visit to the Office of Appraisal Services in Gallup, New Mexico (JA 253), he purported to find mismanagement with regard to appraisals of rights-of-way on Indian lands, and charged present officials with malfeasance even though the appraisals that he purported to review were completed before they took office. In the Interim Report on the NAID investigation - prepared, as we have shown at length, in concert with the accusing party - Mr. Balaran purported to find contumacious conduct.

In his resignation letter, made part of the record by the district court, Mr. Balaran charged that the recusal motion was a sham intended to prevent him from issuing additional reports on his various investigations. The resignation letter declared that the district court had been correct in finding the recusal motion "frivolous" and in "suggesting that it was Interior that acted improperly by impeding my investigation and that Interior had an ulterior motive for seeking my removal." JA 88. Mr. Balaran claimed that his recent "findings" had "implicated the agency's systemic failure to properly monitor the activities of energy companies leasing minerals on individual Indian lands," JA 89. He declared that his findings "could cost the very companies with which senior Interior officials maintain close ties, millions of dollars," JA 89. And he charged that the government's reasons

for seeking disqualification "bear no relationship to the reasons it offers in its recusal motion, but rather to my discovery of significant problems in its appraisal and record-keeping practices." JA 90. His investigation into these matters, Mr. Balaran insisted, "might well result in energy companies being forced to repay significant sums to individual Indians. Interior could not let this happen." JA 90.

Mr. Balaran's resignation did not remove the string of indictments placed in the record, their consequences in this litigation, or the seeds of mistrust that his reports have sown among trust beneficiaries and the public generally. The district court's opinion denying recusal declared that Mr. Balaran's conduct was unobjectionable and indeed, commendable. Plaintiffs have continued to cite Mr. Balaran's reports - and even his resignation letter - to the district court. See, e.g., JA 318 & n.15 (citing the August 20, 2003 appraisal report in support of motion to compel deposition of former Chief Appraiser of BIA's Navajo Regional Appraisal Office); JA 317 & n.13 (citing the resignation letter in asserting that Mr. Balaran had "uncovered powerful evidence of misconduct in the administration of the Trust, including without limitation document destruction, fraud, abuse, and waste of Trust assets").

Mr. Balaran's findings and activities were a prominent feature of plaintiffs' presentation in the recent evidentiary

hearing on the security of Interior's electronic records.¹⁰ In that regard, plaintiffs specifically invoked the conclusions of the Interim Report on the NAID investigation. See, e.g., Tr. 7/20/05 PM, at 18 ("Are you aware that at about this point in time, the special master had found that the agency - that the department had withheld salient data from its quarterly reports to the Court?"); id. at 21 ("Do you remember the special master found that Secretary Norton had withheld information from the Eighth Quarterly Report?"); Tr. 7/29/05 PM, at 80 (arguing that the government had sought to remove the Special Master because he "had just penetrated BLM, he also just filed the report that the Secretary had misrepresented things to this Court in the eighth quarterly report"). Plaintiffs' counsel likewise quoted at length from Mr. Balaran's resignation letter at the hearing. See id. at 19. All of Mr. Balaran's reports are posted for public consumption on the website maintained by plaintiffs' counsel.¹¹

The disqualification statute assigns to the judiciary the task of fashioning the remedies that will best serve the statute's purposes. See United States v. Microsoft Corp., 253

¹⁰ See, e.g., Tr. 5/12/05 PM, at 10-18, 32-33; Tr. 5/13/05 AM, at 11-14, 22-23; Tr. 5/13/05 PM, at 6-13; Tr. 5/20/05 PM, at 61, 65; Tr. 5/23/05 PM, at 58-59; Tr. 5/25/05 PM, at 9-10; Tr. 5/30/05 AM, at 84-90; Tr. 6/6/05 PM, at 82-83; Tr. 6/9/05 AM, at 22-23; Tr. 6/9/05 PM, at 9-10; Tr. 6/10/05 AM, at 30-33, 71-72, 81; Tr. 6/14/05 PM, at 86-92; Tr. 7/18/05 PM, at 9-17; Tr. 7/19/05 AM, at 89-90; Tr. 7/19/05 PM, at 56, 61-68, 98-109; Tr. 7/20/05 AM, at 4-33.

¹¹ See http://www.indiantrust.com/index.cfm?FuseAction=PDFTypes.Home&PDFType_id=2&IsRecent=1 (last visited Aug. 10, 2005).

F.3d 34, 116 (D.C. Cir. 2001). Prospective disqualification of the judicial officer from further participation in the proceedings of course is required. See ibid. In determining whether the officer's decisions should also be vacated, this Court considers "'the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.'" Ibid. (quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988)).

In In re Brooks, this Court explained that if Special Master Balaran should have been recused from the pending individual contempt proceedings in this case, "then any work produced pursuant to the [contempt referrals] must also be 'recused' - that is, suppressed." 383 F.3d at 1044. This Court thus proceeded to consider the arguments for disqualification. This Court determined that Mr. Balaran should have been disqualified from the petitioners' contempt proceedings, and that "[t]herefore any reports, recommendations, or other work product Balaran prepared pursuant to the September 17 referrals may not be submitted to the district court or otherwise disseminated in any manner." Id. at 1046.

The reasoning of In re Brooks applies here with equal force. As we have shown, Mr. Balaran's retention of NAID Vice President Mike Smith to assist in the investigation of NAID's allegations of government misconduct required his disqualification as Special

Master. The retention of Mr. Smith revealed Mr. Balaran's bias, it did not create it. At a minimum, under In re Brooks, this Court should therefore vacate the NAID report issued by Mr. Balaran, as well as the additional reports issued by Mr. Balaran after he hired Mr. Smith. This Court should also bar any prospective reliance on those reports. The NAID report was the product of Mr. Balaran's collaboration with Mr. Smith and is plainly tainted for that reason. Mr. Balaran should have been disqualified in light of his retention of Mr. Smith, and his subsequent reports thus never should have issued. This petition establishes not only the appearance of impropriety, but actual bias. The depth of that bias is underscored by Mr. Balaran's resignation letter, which deemed the disqualification motion "frivolous"; declared it a sham to suppress the results of his investigations; and cavalierly charged not only malfeasance but corruption. JA 88-90. The work of a biased Special Master should not be allowed to infect this litigation indefinitely.

CONCLUSION

For the foregoing reasons, Mr. Balaran's conduct as Special Master required his disqualification from this case. This Court should issue a mandate which includes, at a minimum, the vacating of the Interim Report and the Special Master's reports subsequent to the hiring of Mr. Smith, and a prohibition against any future reliance on those reports.

Respectfully submitted,

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AUGUST 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C)
that the foregoing brief contains 9,713 words, according to the
count of Corel WordPerfect 9.



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2005, I caused copies of the foregoing brief to be sent to the Court and to the following by hand delivery:

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ADDENDUM

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STATUTORY PROVISIONS:

28 U.S.C. § 455 1a

28 U.S.C. § 455 provides:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

- (1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3)** Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4)** He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5)** He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i)** Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii)** Is acting as a lawyer in the proceeding;
 - (iii)** Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv)** Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

- (1)** "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
- (2)** the degree of relationship is calculated according to the civil law system;
- (3)** "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
- (4)** "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
 - (i)** Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
 - (ii)** An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
 - (iii)** The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
 - (iv)** Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.